

STATE OF MICHIGAN
COURT OF APPEALS

MYRA SELESNY, Personal Representative of the
Estate of ABRAHAM SELESNY,

Plaintiff-Appellee,

v

U.S. LIFE INSURANCE CO.,

Defendant-Appellant,

and

PAUL GOEBEL GROUP,

Defendant.

UNPUBLISHED

April 8, 2003

No. 236141

Oakland Circuit Court

LC No. 00-026467-CK

Before: Owens, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Defendant U.S. Life Insurance Co. (“U.S. Life”) appeals by right from an order granting summary disposition to plaintiff’s decedent, Abraham Selesny (“Selesny”).¹ We reverse and remand for further proceedings. This appeal is being decided without oral argument under MCR 7.214(E).

On October 3, 2000, Selesny filed a complaint alleging the following: While licensed to practice law in Michigan, he purchased two disability insurance policies from U.S. Life, using the Paul Goebel Group (“Goebel”) as an agent. He accidentally fell from the roof of his home on July 25, 1993, and suffered several injuries that confined him to a wheelchair. “Notwithstanding his various serious injuries,” he “returned to the practice of law and until 1998, practiced law for periods of time.” However, the injuries and illnesses resulting from the fall became so severe that he “became totally disabled from the practice of law in July, 1998.” He relied on Goebel in choosing which insurance policies to purchase and in making applications for benefits. However, his “condition resulted in him lacking legal capacity under the terms of both policies.”

¹ Apparently, Selesny died before commencement of this appeal, and his personal representative is appearing on his behalf before this Court.

Selesny alleged that Goebel failed to inform him of a time limit for applying for benefits under the two insurance policies in question and that U.S. Life subsequently refused to pay him any benefits because “the claims were submitted after an alleged due date.” Selesny argued in the complaint that the policies contained no “due date” that served to bar his claims and that he “lacked legal capacity following his disability in July, 1998.” He further alleged that “[t]here are continuing periods of disability and thus Selesny’s claim is timely for those periods.”

Selesny set forth four causes of action: “breach of contract” by U.S. Life, “unfair and prohibited trade practices” by U.S. Life, “misrepresentation” by U.S. Life, and “negligence” by Goebel. On March 28, 2001, Selesny moved for summary disposition against U.S. Life under MCR 2.116(C)(8) and (C)(10), alleging that U.S. Life erred in denying benefits under the plain terms of the policy. Selesny attached to his motion U.S. Life’s answers to certain interrogatories. When asked to “[s]et forth the complete basis upon which benefits are being denied by Defendant,” U.S. Life replied, “U.S. Life refers Plaintiff to its denial letter dated August 1, 2000.” In this letter, also attached to Selesny’s motion, U.S. Life stated:

We have completed our review of your claims for Long Term Disability and Office Overhead Expenses, and conclude that benefits are not payable.

Please note the following policy provision: *Under the terms of the policy, written proof of loss for benefits must be given within 90 days after the termination of a period for which United States Life is liable. For all other losses, written proof of loss must be given within 90 days after the date of loss. If it is not reasonably possible to give written proof in the time required, United States Life will not reduce or deny the claim for this reason if the proof is filed as soon as reasonably possible. In any event, the proof required must be given no later than 1 year from the time specified unless the insured person lacked legal capacity.*

Our records indicate a disability date of July 8, 1998. The claims were not received until April 6, 2000. In order for us to have considered these claims, they should have been received by October 8, 1999 (policy G-197782), and August 6, 1999 (policy G-197783).

In you have any documentation proving you lacked legal capacity during the time in question, we would be happy to review [it] and advise you accordingly.

Finally, the Company reserves any and all defenses, which it has or may have had with respect to any claim under these policies. We are sorry our decision could not be more favorable to you, however, please understand that we must abide by the terms and conditions of the policy. [Italics and bolding in original.]

Selesny also asked the following in an interrogatory:

If any part of the basis of the denial is that written proof of loss for benefits was not given within 90 days after the termination of a period for which

United States Life was liable, set forth: (a) What period is referred to; [and] (b) All reasons why United States Life was liable for that period.

U.S. Life replied:

U.S. Life objects to this interrogatory because of its vague and confusing phrasing. Moreover, Plaintiff appears to misquote the Policy language as quoted in U.S. Life's denial letter. Answering further without waiving this objection, the period referred to is the period in which an insured claims he or she was totally disabled within the definitions set forth in the policies. Based on these definitions and information submitted by Plaintiff, U.S. Life determined that Plaintiff was totally disabled on July 8, 1998.

Selesny argued in his summary disposition motion that "[t]he clause upon which U.S. Life relies does not support the rejection of the Benefits." He stated, "[t]here has been no 'termination of a period for which US Life is liable' and thus the time limit has not been triggered." He further alleged:

[Selesny] has continuing disability and thus, there has been no termination of a period for which U.S. Life is liable. Moreover, U.S. Life has not provided a period during which it was liable for benefits. Thus, U.S. Life's denial of benefits was completely without foundation and no factual support.

On April 25, 2001, U.S. Life filed its own motion for summary disposition under MCR 2.116(C)(10) and (I)(2), stating, among other things:

Both the policies at issue in this case clearly state that an insured must provide written proof of loss ninety days after the termination of any month for which the insured seeks benefits, or in any event no later than one year later. Here Plaintiff completely failed to provide written proof of loss for almost two years and his claim was properly denied.

U.S. Life claimed that for monthly benefits, the following provision from the policies applied: "Time of Payment of Claim: Claims for losses that are paid periodically will be made each month subject to due written proof of loss. Payment for any other loss will be paid immediately upon receipt of due written proof of loss."² U.S. Life then quoted the provision stating that "[w]ritten proof of loss for benefits that are payable periodically must be given within 90 days after the termination of a period for which U.S. Life is liable." U.S. Life claimed that "an insured must provide proof of loss within ninety days of the end of each month for which benefits are sought." U.S. Life then stated that Selesny's benefits were not payable because he "did not submit a proof of loss to U.S. Life until April 6, 2000 – some 21 months after his date of total disability."³

² U.S. Life attached a copy of the relevant provisions from the policies to its motion for summary disposition.

³ U.S. Life's argument in their summary disposition brief was not entirely clear. Indeed, while
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The summary disposition hearing occurred on May 2, 2001. Selesny argued that the provision stating that “[w]ritten proof of loss for benefits that are payable periodically must be given within 90 days after the termination of a period for which U.S. Life is liable” did not serve to bar his claims because his disability had not been terminated. He argued, “The period for which they’re liable is the disability and . . . [i]t hasn’t been triggered.” U.S. Life stated:

If you take a look at the exact section that we’re talking about, the proof of loss section, it’s very clear what U.S. Life is talking about. There are two different kinds of benefits here. There are periodic payments, monthly payments, for things like disability benefits, and then there are lump sum type benefits for like a death or something like that. With respect to the first kind of benefit, periodic benefits, it says we need you to make a claim within 90 days for a period for which U.S. Life is liable or within 90 days after the termination for the period for which U.S. Life is liable.

That’s clearly referring to the period, the month for which you’re claiming. For all other losses within 90 days of the proof of loss. If you were to read out of this language the requirement that the claim be made within 90 days of the monthly benefits sought . . . the all other losses section has absolutely no meaning.

The trial court ruled as follows:

The issue before the Court is whether the Plaintiff is entitled to disability benefits under the policy at issue, specifically whether he timely filed the proof of loss. To determine whether Plaintiff may be entitled to benefits under the policy, we look to the language of the insurance policy to interpret its terms under Michigan’s well[-]established principles of contract construction. An insurance contract must be read as a whole and meaning given to all terms. The language of the contract is to be given its ordinary, plain meaning and technical, constrained constructions should be avoided.

Ambiguities in the policy are construed against the insurer, who is the drafter of the contract. . . . The relevant language of the proof of loss requirements are [sic] found on page nine of the policy. This policy provides for both periodic payments and lump sum payments, depending on the circumstances.

Plaintiff’s principle [sic] argument is because there has been no, “termination of a period for which U.S. Life is liable,” the time limit has not been triggered. Although Defendant makes much about the fact that the phrase, “los[s]

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U.S. Life suggested that Selesny was seeking periodic benefits payments, it failed to explain why Selesny was not entitled to benefits payments for the period beginning ninety days before his submission of a proof of loss. Instead, U.S. Life focused on the July 8, 1998, date of total disability and claimed that Selesny was not entitled to benefits payments because he filed his proof of loss more than one year after that date.

for benefits that are payable periodically” is left out by Plaintiff and this time limit refers to monthly periodic payments, this Court is satisfied that the plain language does not support that interpretation and is satisfied that the period of disability has not terminated and the time limit has not been triggered.

As to the time limits referring to all other . . . benefits – that is benefits not payable periodically, the policy also sets forth strict time limits. However, in paragraphs 19 and 20 of the Complaint, Plaintiff alleges that he lacks legal capacity under the policy “due to the medication that he was taking and the psychological distress he was experiencing.” Thus, at least a question of fact exists as to whether Plaintiff lacked the legal capacity to submit proof in a specified time.

The court then entered an order granting Selesny’s motion for summary disposition and denying U.S. Life’s motion for summary disposition. The order stated, in part, “This Court grants summary disposition to Plaintiff and finds that he is entitled to benefits on both policies at issue in this case, commencing with the disability date of July 8, 1998 and allowing for the waiting periods set forth in the policies.” The court issued an additional order specifying that the claim against Goebel was dismissed, with the dismissal to be nullified should this Court reverse on appeal the order granting Selesny’s motion for summary disposition.

On appeal, U.S. Life claims that the trial court ignored the plain language of the insurance policies in granting Selesny’s motion for summary disposition.

This Court reviews de novo a trial court’s ruling with regard to a summary disposition motion. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). Motions brought under MCR 2.116(C)(8) test the legal sufficiency of a claim with regard to the pleadings alone. *Madejski v Kotmar Ltd*, 246 Mich App 441, 443-444; 633 NW2d 429 (2001). “All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party.” *Id.* at 444. “Summary disposition under MCR 2.116(C)(8) is proper ‘when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.’” *Corley v Detroit Bd of Ed*, 246 Mich App 15, 18; 632 NW2d 147 (2001), quoting *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party must initially support its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* at 455. “The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the opposing party would bear the burden of proof at trial, that party may not merely rely on the allegations or denials in the pleadings but must set forth specific facts demonstrating the existence of a genuine issue of material fact. *Smith v Globe Life Ins Co*, *supra* at 455. The trial court must view the affidavits and other documentary evidence submitted by the parties in the light most favorable to the opposing party. *Id.* at 454. If the opposing party fails to establish the existence of a material factual dispute, summary disposition is appropriate. *Id.* at 455.

Moreover, the interpretation of contractual language is a question of law subject to de novo review on appeal. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d

237 (1998). A clear and unambiguous insurance policy must be enforced as written, using the plain and easily-understood meanings of the policy's terms. *Gelman Sciences, Inc v Fidelity & Casualty Co*, 456 Mich 305, 318; 572 NW2d 617, amended 456 Mich 1230 (1998); *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). Moreover:

A contract is said to be ambiguous when its words may reasonably be understood in different ways.

If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand that there is no coverage under the same circumstances the contract is ambiguous and should be construed against the drafter and in favor of coverage.

Yet, if a contract, however unartfully worded or clumsily arranged, fairly admits of but one interpretation, it may not be said to be ambiguous or, indeed, fatally unclear. [*Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982).]

Here, the policies each state:

Proof of Loss: Written proof of loss for benefits that are payable periodically must be given within 90 days after the termination of a period for which United States Life is liable. For all other losses, written proof of loss must be given within 90 days after the date of loss. If it is not reasonably possible to give written proof in the time required, United States Life will not reduce or deny the claim for this reason if the proof is filed as soon as reasonably possible. In any event, the proof required must be given no later than 1 year from the time specified unless the Insured Person lacked legal capacity.

Time of Payment of Claim: Payment for losses that are paid periodically will be made each month subject to due written proof of loss. Payment for any other loss will be paid immediately upon receipt of due written proof of loss.

In our opinion, under "a fair reading of the entire contract of insurance," the above provisions, "however unartfully worded or clumsily arranged, fairly admit[] of but one interpretation" *Id.* Indeed, the provisions, read together, make clear that an insured must submit a proof of loss within ninety days after a monthly period for which U.S. Life is liable. Plaintiff contends that the "period for which United States Life is liable" under the "Proof of Loss" provision is the entire period of disability. In support of this assertion, plaintiff cites the following provision from the policies:⁴

Once a period of disability starts, United States Life will consider it as one continuous period no matter what sickness or injury causes it to continue. A continuous period of disability ends when the injured person is no longer

⁴ The language from one policy differs slightly from this excerpt but is materially identical.

considered totally or residually disabled. Successive periods of disability, either total or residual, if applicable, will be considered one period of disability unless they are due to unrelated causes or separated by a return to work for 3 or more continuous months. A separate waiting period will apply for each separate period of total and/or residual disability.

According to plaintiff, this provision indicates that a proof of loss need not be filed for monthly benefits until ninety days after the termination of the disability as a whole. However, this provision is not contained within the “Proof of Loss” provision of the policies and is labeled “Successive Periods of Disability” and “Continuous Periods of Disability” under the policies. The context makes clear that it deals with the proper treatment of periods of disability caused by unrelated circumstances or separated by a return to work. We do not agree that the above provision applies to the “Proof of Loss” provision.

Indeed, to accept plaintiff’s interpretation – that an insured seeking monthly benefits payments need not submit a proof of loss until ninety days after the complete elimination of the disability – would essentially render nugatory the provision stating that “[p]ayment for losses that are paid periodically will be made each month subject to due written proof of loss.” As noted in *Associated Truck Lines, Inc v Baer*, 346 Mich 106, 110; 77 NW2d 384 (1956), courts should, if possible, give meaning to every word in a contract. The contractual provisions as a whole make clear that a proof of loss is to be submitted within ninety days after the month for which periodic benefits are sought. See, e.g., *Monti v League Life Ins Co*, 151 Mich App 789, 797; 391 NW2d 490 (1986). Accordingly, the trial court erred in granting summary disposition to Selesny.

Plaintiff additionally contends that even if Selesny did not timely submit a proof of loss, summary disposition in Selesny’s favor was nonetheless warranted because “the policy does not specifically require that benefits are forfeited as a result of allegedly untimely proofs of loss.” We disagree. Indeed, the policies require proofs of loss to be filed within specified periods, and an insured foregoes benefits by failing to meet such time deadlines. See, e.g., *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 144-145; 433 NW2d 380 (1988).

While we conclude that the trial court erroneously granted summary disposition to Selesny, we disagree with U.S. Life that the court should have granted summary disposition to it. Indeed, a complete denial of benefits is not appropriate at this point in the proceedings, because plaintiff should receive at least the benefits applicable on the date Selesny submitted a proper proof of loss. See, e.g., *Monti, supra* at 800. Moreover, Selesny raised an issue below regarding his alleged lack of capacity, and further proceedings are necessary to resolve this issue.⁵

⁵ We note that U.S. Life does not claim on appeal and did not claim below that Selesny failed to submit sufficient documentation of the alleged lack of capacity in order to survive a summary disposition motion by U.S. Life.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Patrick M. Meter